Supreme Court, U.S.
FILED

061270 MAR 13 2007

OFFICE OF THE CLERK

No. 07-

In the
Supreme Court of the United States

United States of America
Respondent-Appellee,
v.
George Clive Hook,
Petitioner-Appellant.

On Petition for Writ of Certiorari
to the
UNITED STATES COURT OF APPEALS
For the
SEVENTH CIRCUIT
(No. 06-1362)

APPENDIX

George Clive Hook
Pro Se
Member of the Supreme Court Bar
1201 Deerfield Parkway
Buffalo Grove, Illinois 60089
(847) 947-7975

INDEX TO APPENDIX

Page

Seventh Circuit Mandate issued 1/4/07.....1

Seventh Circuit Opinion (US v. Hook, 471 F.3d 766 (7th Cir. 2006).....2

Docket entry of 1/20/06 Order of Judge Joan Humphrey Lefkow.....19

Memorandum Opinion and Order of Judge Joan Humphrey Lefkow, US District Court for the Northern District of Illinois (04 CR 1045)..... .20

United States Constitution:
Article I, §8.....37
Article I, §9.....37
Article IV, §2.....37
4th Amendment.....37
5th Amendment.....37
8th Amendment.....37
9th Amendment.....37
10th Amendment.....38
13th Amendment.....38

Statutory Provisions:
18 USC 664.....38
18 USC 1343.....39
18 USC 1956.....39
18 USC 1961.....41
18 USC 3583.....41
18 USC 3601.....45

18 USC 3603.....45
18 USC 3663.....46
18 USC 3663A.....49
28 USC 1361.....50
28 USC 1651.....50
28 USC 2201.....51
18 USC 2202.....51
28 USC 2241.....51
28 USC 2255.....53
42 USC 14135a.....55
USSG 5D1.3.....58
DNA Analysis Backlog Identification
Act of 2000, §7b.....45

Federal Rules:
Federal Rules of Criminal Procedure
With respect to Modification
Rule 32.1(b) as in effect at Hook's
Sentencing.....59
Rule 32.1(c) as if effect when Judge
Manion rendered his recent decision.....60

Federal Regulations:
DOL §2510.3-101.....62

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

NOTICE OF ISSUANCE OF MANDATE

'E: January 4, 2007

FILED

JAN - 4 2007 PH

MICHAEL W. DOBBINS
CLERK, U.S. DISTRICT COURT

Michael W. Dobbins
United States District Court
Northern District of Illinois
219 S. Dearborn Street
Chicago, IL 60604

)M: Clerk of the Court

: 06-1362
USA v. Hook, George
04 CR 1045, Joan Humphrey Lefkow, Judge

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion/order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[X] Original record on appeal consisting of:

CLOSED:		TO BE RETURNED AT LATER DATE:
[1] PH	Volumes of pleadings	[ ]
[ ]	Volumes of loose pleadings	[ ]
[ ]	Volumes of transcripts	[ ]
[ ]	Volumes of exhibits	[ ]
[ ]	Volumes of depositions	[ ]
[ ]	In Camera material	[ ]
[ ]	Other_____	[ ]
	Record being retained for use in Appeal No. _____	[ ]

Copies of this notice sent to: Counsel of record
[X] United States Marshal
[X] United States Probation Office

TE TO COUNSEL:

If any physical and large documentary exhibits have been filed in the above-entitled cause, they are to be withdrawn ten days from the date of this notice. Exhibits not withdrawn during this period will be disposed of.

Please acknowledge receipt of these documents on the enclosed copy of this notice.

- -

Received above mandate and record, if any, from the Clerk, U.S. Court of Appeals for the Seventh Circuit.

te: _____ _____
071-120397) Deputy Clerk, U.S. District Court

In the
United States Court of Appeals
for the Seventh Circuit

No. 06-1362

UNITED STATES OF AMERICA
Plaintiff-Appellee,
v.
GEORGE C. HOOK,
Defendant-Appellant.

Appeal from the United States District Court
For the Northern District of Illinois, Eastern Division,
No. 04 CR 1045—Joan Humphrey Lefkow, Judge

ARGUED SEPTEMBER 27, 2006
DECIDED DECEMBER 13, 2006

Before POSNER, MANION, and WILLIAMS, Circuit Judges.

MANION, *Circuit Judge.* George Clive Hook, a white collar criminal, was scheduled by his probation officer to submit to DNA collection while serving his term of supervised release. Hook filed a verified petition with the district court objecting to this process. The district court denied Hook's petition and ordered him to submit to DNA collection. Hook appeals, and we affirm.

In 1998, George Clive Hook was convicted by a jury of wire fraud, money laundering, and theft involving an employee benefit plan. The district court sentenced Hook to eighty-four months' imprisonment and thirty-six months of supervised release. Among the conditions of his supervised release, the district court ordered Hook to follow his probation officer's instructions and not to commit any additional crimes. After serving his term of imprisonment and over a year of supervised release, Hook's probation officer scheduled him for DNA collection in October 2005 pursuant to the Justice for All Act of 2004, Pub. Law No. 108-405, 118 Stat. 2260, and the DNA Analysis Backlog Elimination Act of 2000, Pub. Law No. 106-546, 114 Stat. 2726 (codified at 42 U.S.C. §§ 14135-14135e) (collectively "DNA Act"). Hook filed a verified petition in the district court alleging that the DNA collection violated his contract with the government, violated his rights under the Fourth, Fifth, Eighth, Ninth, Tenth, and Thirteenth Amendments, and violated the Ex Post Facto and Bill of Attainder clause, Article I, § 9, the Equal Protection clause, Article IV, § 2, of the Constitution, and the separation of powers doctrine. After a hearing, the district court denied Hook's petition, finding the DNA Act constitutional, and ordered him to submit to DNA testing. Hook appeals, raising the issues set forth in his petition and further arguing that the district court abused its discretion in denying his request for termination of supervised release. We first set forth the landscape of the DNA Act and then address each of Hook's claims in turn.

II.

In 2000, Congress enacted the DNA Analysis Backlog Elimination Act, which required DNA samples to be collected from individuals in custody and while on probation,

parole, or supervised release after being convicted of certain violent crimes. 42 U.S.C. § 14135a(d) (2001).

Congress amended the supervised release statute to add the DNA sample requirement to supervised release. 18 U.S.C. § 3583(d). Then in 2004, Congress passed the Justice For All Act which amended the DNA Act, expanding the list of qualifying offenses to include, as relevant here, any felony. 42 U.S.C. § 14135a(d) (2004). Congress mandated that the United States Probation Office collect DNA samples of those individuals under its supervision and submit those samples to the Federal Bureau of Investigation ("FBI") for inclusion in its Combined DNA Index System ("CODIS"). 42 U.S.C. § 14135a(a)(2), (b). Failure of an individual covered by the DNA Act to submit to DNA collection constitutes a class A misdemeanor subject to punishment according to Title 18. 42 U.S.C. § 14135a(a)(5). The information maintained in CODIS may be disclosed only to law enforcement agencies for "identification purposes," "in judicial proceedings," "for criminal defense purposes," and for statistical and quality control purposes, in the case of the latter if personally identifiable information is first removed. 42 U.S.C. § 14132(b)(3)(A)-(D).

Finally, the DNA Act provides a criminal penalty for those who improperly use or disclose CODIS information. 42 U.S.C. § 14133(c).

Against this backdrop, we consider Hook's challenge to the probation officer's directive to submit to DNA collection. In challenging the DNA collection, Hook makes three arguments: First, he claims that requiring him to submit to DNA collection is an impermissible modification of his term of supervised release. Second, he argues that the district court abused its discretion by failing to consider his request for termination of supervised release. Third, he con-

tends that the imposition of the DNA collection requirement violates a contract he entered into with the United States at the time he was sentenced to a term of supervised release. We review legal questions de novo. United States v. Celliti, 387 F.3d 618, 621 (7th Cir. 2004). A district court's imposition of conditions of supervised release or denial of requests for modification is reviewed for abuse of discretion. United States v. Nonahal, 338 F.3d 668, 670 (7th Cir. 2003) (citation omitted).

Hook first contends that the DNA collection requirement is a modification of his sentence of supervised release. Specifically, he argues that the DNA collection requirement constitutes an additional, impermissible condition of his term of supervised release because it was not imposed as a condition originally at the time of his sentencing. However, as noted above, the original term of supervised release instituted by the district court required Hook to "follow the instructions of the probation officer" and not "commit another federal, state, or local crime." In this case, the probation officer instructed Hook to submit to DNA collection, and this brings the DNA collection into his original sentence.

Moreover, even if the DNA testing did not fit with the terms of the original sentence, the district court held a hearing on Hook's petition prior to ordering him to comply with the DNA testing. This hearing satisfies the conditions of Fed. R. Crim. P. 32.1(c)(1), which requires a hearing prior to the modification of the terms of supervised release. Therefore, to the extent that there was any modification, the modification was properly made.

Second, Hook asserts that the DNA collection requirement violates "the agreement between US [sic] and Hook," and that collection breaches his contract with the government.

There was no plea agreement in this case, but rather Hook was convicted by a jury. While there is nothing before us on appeal to suggest that there was an agreement between the government and Hook regarding sentencing recommendations, even if such an agreement existed, the district court is not bound by any recommendations made by the government at sentencing. United States v. Grimm, 170 F.3d 760, 768 (7th Cir. 1999). Moreover, a sentence within the sentencing guidelines and below the statutory maximum does not create a contract. Therefore, Hook's argument based on contract fails because no contract is present in this situation.

Hook also claims that the district court abused its discretion by failing to consider his request to terminate supervised release. Section 3583(e)(1) provides that "a court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4),(a)(5), (a)(6), and (a)(7)-terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release . . . ." 18 U.S.C. § 3583(e)(1)(emphasis added). The language in this statute is discretionary, and the district court has wide discretion in determining whether to terminate an individual's term of supervised release. See United States v. Sines, 303 F.3d 793, 800 (7th Cir. 2002). We find that Hook "makes no real effort to explain how the district court abused its discretion in refusing to modify his supervised release conditions." Nonahal,338 F.3d at 670 (citation omitted). Rather, Hook merely asserts that he is entitled to a termination of his supervised release because the government attempted to improperly impose an additional condition of supervised release, namely DNA collection. Hook believes this somehow should exempt him from the completion of his term of

supervised release. He cites no authority showing how an attempt to improperly impose an additional term of supervised release would render improper any remaining time on supervised release. Clearly, the statutory mandate for the DNA collection did not constitute an improper additional term. Accordingly, the district court did not abuse its discretion by denying Hook's request for termination of supervised release.[1]

Turning now to Hook's constitutional claims: Hook asserts that the DNA Act violates numerous sections of the Constitution, including the Fourth, Fifth, Eighth, Ninth, Tenth, Thirteenth and Fourteenth Amendments, the Ex Post Facto and Bill of Attainder Clause, and the separation of powers doctrine. We begin with Hook's Fourth Amendment claim. Hook contends that the DNA Act violates his Fourth Amendment right against unreasonable searches and seizures and that the DNA Act is not exempted from the Fourth Amendment warrant requirement by either special needs or the totality of the circumstances.

In Green v. Berge, 354 F.3d 675 (7th Cir. 2004), this court previously addressed whether a Wisconsin statute requiring convicted felons to furnish DNA samples for a state data bank violated the Fourth Amendment. In Green, we concluded that taking a DNA sample is a Fourth Amendment search, but that such a search may be reasonable if it falls into an exception to the warrant requirement. Green, 354 F.3d at 677. We applied the "special needs" ap-

---

[1]Hook also attempts to challenge the restitution order originally imposed. Because restitution was part of his original sentence, any challenge to that order needed to be made on direct appeal within ten days. Fed. R. App. P. 4(b)(1). Hook did not appeal from that sentence and cannot challenge the restitution order.

proach, which provides an exemption from the Fourth Amendment warrant requirement when there are "special needs, beyond the normal need for law enforcement, mak[ing] the warrant and probable-cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)). The considerations that are examined in determining whether a search qualifies as a special need include the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search, and the manner in which the search is executed. Green, 354 F.3d at 677 (citation omitted). Key to our holding in Green was that the primary purpose of the statute was not to search for evidence of criminal wrongdoing, but to "obtain reliable proof of a felon's identity," that those subject to the law were aware of the purpose of the collection, and that there were safeguards to protect against unauthorized use of the information. Id. at 678-79. We concluded that the Wisconsin statute was "narrowly drawn," served an "important state interest," provided the "most reliable evidence of identification" of those in custody, and therefore withstood "constitutional attack under the firmly entrenched 'special needs doctrine.' " Id. at 679.

The federal DNA Act mirrors the Wisconsin statute in several important ways. Like the DNA Act, the Wisconsin statute required all imprisoned felons in Wisconsin to submit DNA samples. Id. at 676. The Wisconsin statutory scheme also similarly provided that the samples be held at the state crime laboratory subject to confidentiality provisions and sanctions for misuse of the information. Id. (citations omitted). In light of these similarities, we find our analysis in Green instructive in addressing Hook's Fourth Amendment challenge of the federal DNA Act.

Hook attempts to distinguish Green by focusing on the fact that Green was incarcerated and not on supervised release. The difference between those in custody and those under supervision is a distinction without a difference for the purposes of the DNA Act and the Fourth Amendment. Individuals under supervision are subject to control by the state, although to a lesser degree than those incarcerated. See id. at 680 (Easterbrook, J., concurring). Those under supervised release "do not enjoy 'the absolute liberty to which every citizen is entitled, but only...conditional liberty properly dependent on observance of special restrictions.' " Griffin, 483 U.S. at 874 (quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972) (describing individuals on parole or probation)).

Furthermore, the management of supervised release "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Id. at 873. Therefore, insofar as Green addresses the special needs of DNA collection statutes, we find it instructive.

As we noted in Green, "state and federal courts that have [addressed the validity of DNA collection statutes] are almost unanimous in holding that these statutes do not violate the Fourth Amendment." Green, 354 F.3d at 677 (citation omitted), see also Johnson v. Quander, 440 F.3d 489, 496 (D.C. Cir. 2006); United States v. Conley, 453 F.3d 674, 677 (6th Cir. 2006); United States v. Kraklio, 451 F.3d 922, 924 (8th Cir. 2006); United States v. Sczubelek, 402 F.3d 175, 184 (3d Cir. 2005); Groceman v. U.S. Dept. of Justice, 354 F.3d 411, 413-14 (5th Cir. 2004); United States v. Kincade, 379 F.3d 813, 838-39 (9th Cir. 2004); United States v. Kimler, 335 F.3d 1132, 1146 (10th Cir. 2003); Boling v. Romer, 101 F.3d 1336, 1340 (10th

Cir. 1997); Jones v. Murray, 962 F.2d 302, 308 (4th Cir. 1992). As we found in Green, taking a DNA sample is a Fourth Amendment search, but such a search may be reasonable if it falls into an exception to the warrant requirement. Green, 354 F.3d at 677. While some circuits have employed a reasonableness standard, see, e.g., Sczubelek, 402 F.3d at 184; Kraklio, 451 F.3d at 924, we employed the "special needs" approach in Green and will do the same here.

The federal DNA Act seeks to establish a database of accurate felon identification information and to deter recidivism, see Kincade, 379 F.3d at 838-39, not to search for information on a specific crime or to detect "ordinary criminal wrongdoing," City of Indianapolis v. Edmond, 531 U.S. 32, 38 (2000). The DNA Act also restricts the use of information collected, limiting who may receive the information and penalizing those who misappropriate the information. See 42 U.S.C. § 14135e. Furthermore, the probation officer has no discretion about who will be subject to DNA collection: all individuals covered by the DNA Act must provide a DNA sample. See 42 U.S.C. § 14135a(a)(2). As we noted above, the statute only covers individuals who are subject to restrictions on their liberty through custody, probation, or supervision. Further, the blood draw that is employed to collect a DNA sample is considered routine, see Schmerber v. California, 384 U.S. 757, 771 n.13 (1966) (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1957)), and the intrusion minimal, Sczubelek, 402 F.3d at 184. While a DNA sample contained in CODIS may be used at a later date in relation to law enforcement, such information may also be used to exonerate an individual. Id. at 185. Regardless, the special need is primary and "goes beyond the ordinary law en-

forcement need." Kimler, 335 F.3d at 1146. All of these characteristics of the DNA Act support a finding that it qualifies as a special need justifying a departure from the usual warrant and probable cause requirements of the Fourth Amendment. See Griffin, 483 U.S. at 873. Accordingly, applying the reasoning in Green to the federal DNA Act, we conclude that because "DNA testing of [supervised releasees]is ultimately for a law enforcement goal, it seems to fit within the special needs analysis the [Supreme] Court has developed for drug testing and searches of probationers' homes, since it is not undertaken for the investigation of a specific crime." Green, 354 F.3d at 678 (citation omitted). Therefore, we conclude that the DNA Act does not violate the Fourth Amendment.

Hook next argues that the DNA collection requirement violates his Fifth Amendment rights by inducing self-incrimination and depriving him of property without due process. Hook, however, did not provide citation support or substantive argument for his assertion that the DNA Act constitutes a deprivation of property without due process. Therefore, this argument is waived, and we need not address it. See United States v. Brown, 899 F.2d 677, 679 n.1 (7th Cir. 1990). His claim of unconstitutional self incrimination also fails because the taking of blood samples or fingerprints is not testimonial evidence and as such is not protected by the Fifth Amendment. United States v. Pipito, 861 F.2d 1006, 1009 (7th Cir. 1987) (citing Schmerber v. California, 384 U.S. 757 (1966)). The Fifth Amendment also does not protect photographing or requiring an individual to speak for identification purposes. Id. Accordingly, the DNA collection done here by means of a non-testimonial blood draw is not protected by the Fifth Amendment. Moreover, the information that is extracted from the blood,

DNA, is another form of physical, genetic identification of an individual not unlike a photograph or fingerprint and is thus also not protected by the Fifth Amendment.

We next address Hook's equal protection argument.[2] Hook argues that applying the DNA Act to him because he was on "supervised release for federal offenses which had nothing to do with bodily fluids" is a denial of his right to equal protection. The equal protection clause of the Constitution "secure[s] every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." Smith v. City of Chicago, 457 F.3d 643, 650 (7th Cir. 2006). The level of scrutiny applied in determining whether the appropriate protection has been afforded depends upon the class that is involved, i.e., a suspect, quasi-suspect, or other classification. Artway v. Att'y Gen., 81 F.3d 1235, 1267 (3d Cir. 1996) (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439 (1985)). Felons are not a protected class, and therefore the government need only have a rational basis for the DNA Act. Baer v. City of Wauwatosa, 716 F.2d 1117, 1125 (7th Cir. 1983). To prevail on his claim, then,

---

[2]Although Hook does not classify his equal protection claim under the Fifth Amendment, the Supreme Court has noted that while the Fourteenth Amendment applies to the states, the Fifth Amendment applies to the federal government and also "contains an equal protection component." San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 542 n.21 (1987). The approach to Fifth Amendment equal protection claims has "been precisely the same as to equal protection claims under the Fourteenth Amendment." Id. (quoting Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975)).

Hook "must prove the following: (1) the defendant intentionally treated him differently from others similarly situated, (2) the defendant intentionally treated him differently because of his membership in the class to which he belonged, and (3) the difference in treatment was not rationally related to a legitimate state interest." Smith, 457 F.3d at 650-51 (citation omitted).

As a threshold matter, Hook does not identify those similarly situated to himself who are treated differently by virtue of the DNA Act. In any event, the DNA Act is rationally related to the government's interests in deterring recidivism and maintaining accurate identification information of criminals, regardless of the rate of recidivism among certain types of offenders. See United States v. Conley, 453 F.3d 674, 679 (6th Cir. 2006) (citation omitted) (upholding the DNA Act and noting that "rate of recidivism in certain groups of white-collar criminals is very close to the rate of recidivism in firearm offenders, and is only slightly lower than felons convicted of robbery," in response to a white collar defendant's challenge of the DNA Act as applied to white collar criminals). Therefore, in light of this rational basis and the minimal inconvenience presented to Hook by submitting to a blood draw, we find no equal protection violation.

In addition to the Fourth and Fifth Amendments, Hook contends that the DNA Act violates the Eighth Amendment. "The Eighth Amendment prohibits punishments which involve the unnecessary and wanton infliction of pain, are grossly disproportionate to the severity of the crime for which an inmate was imprisoned, or are totally without penological justification." Whitman v. Nesic, 368 F.3d 931, 934 (7th Cir. 2004) (citations omitted). As stated above, blood draws are considered routine. See Schmerber

v. California, 384 U.S. 757, 771 n.13 (1966) (quoting Breithaupt v. Abram, 352 U.S. 432, 436 (1957)). Further, the government's desire for identifying information along with the minimal pain and discomfort accompanying a blood draw take the DNA Act outside of the ambit of cruel and unusual punishment. Under these circumstances, DNA collection does not constitute cruel and unusual punishment.[3]

We now turn to Hook's Ninth, Tenth, and Thirteenth Amendment claims. "We repeatedly have made clear that perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived (even where those arguments raise constitutional issues)." United States v. Lanzotti, 205 F.3d 951, 957 (7th Cir. 2000) (citing United States v. Berkowitz, 927 F.2d 1376, 1384 (7th Cir. 1991)); Fed. R. App. P. 28(a)(4). In this case, Hook fails to elucidate what rights, if any, he has retained by virtue of the Ninth Amendment which the DNA Act violates. Hook also fails to cite any case law in support of his Ninth Amendment claim. Similarly, as the district court stated in addressing Hook's Tenth Amendment claim, Hook "fails to assert any authority in support of his argument" that the DNA Act violates the Tenth Amendment. Hook's invocation of the Tenth Amendment, without any explication, is "perfunctory and undeveloped." Further, his argu-

---

[3]Hook provides an uncited, but novel assertion that the Founding Fathers would have considered "blood extraction" to be "cruel and unusual punishment" because, purportedly, "[v]ampires were feared and vilified" at the time of the Founding. Even accepting this proposition, blood extraction by a vampire is certainly distinguishable from a sanitary blood draw under current medical practice.

ments regarding any Commerce Clause implications are without citation or merit.[4] Finally, regarding his Thirteenth Amendment claim, Hook fails to provide any citation or basis for his assertion that the "punishment" of the DNA collection constitutes enslavement. Merely setting forth a constitutional amendment and asserting a violation, without further explication, does not present an issue for review and results in a waiver of that issue. Therefore, we deem Hook's Ninth, Tenth, and Thirteenth Amendment claims waived.

We turn now to Hook's claims under Article 1, section 9, clause 3 of the Constitution that the DNA Act violates the Ex Post Facto Clause and constitutes a bill of attainder. In determining whether a statute constitutes a retroactive law in violation of the Ex Post Facto Clause, the court looks to the purpose of the legislation. Gilbert v. Peters, 55 F.3d 237, 238 (7th Cir. 1995) (citing Trop v. Dulles, 356 U.S. 86, 96 (1958)).

If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, we must further examine whether the statutory scheme is so punitive either in purpose or effect as to negate [the State's] intention to deem it civil. Smith v. Doe, 538 U.S. 84, 92 (2003) (citations omitted).

---

[4] Hook asserts that his blood is outside the scope of the Commerce Clause because it regenerates every 120 days, and he has not traveled out of state in over 120 days. Were we to accept this argument, we might be prompted to recommend a blood draw every four months, but for the fact that there is no indication that Hook also produces new DNA during regeneration, perhaps thankfully so for Hook.

The D.C. Circuit in Johnson v. Quander, 440 F.3d 489, 500-01 (D.C. Cir. 2006), recently upheld the federal DNA Act and the D.C. implementation statute against an Ex Post Facto claim. The D.C. Circuit held that the anti-recidivism and public safety provisions cited by the U.S. Supreme Court in Smith were applicable to the DNA Act and evinced that the DNA Act was punitive in neither purpose nor effect. We agree. The purpose of the DNA Act, as stated above, is to have a national registry of information regarding those covered by the statute and to deter future criminal conduct. Such administrative intent is not punitive. As for the effect, it involves a blood test and retention of information, neither of which is punitive. Gilbert, 55 F.3d at 238-39 (holding that a blood specimen statute does not violate the Ex Post Facto Clause). In the event that Hook had committed other crimes for which he might be convicted as a result of his DNA being collected, any punishment that he would receive would be in relation to a new conviction, not his original conviction, and thereby would not violate the Ex Post Facto Clause. Furthermore, the DNA Act does not operate retroactively to punish Hook for his original crime, but rather any punishment that would ensue would be the result of new conduct, i.e., Hook's failure to comply with the DNA Act. Accordingly, we affirm the district court's rejection of Hook's assertion that the DNA Act violates the Ex Post Facto Clause of the Constitution.

Hook also contends that the DNA Act constitutes a bill of attainder which the Constitution prohibits Congress from passing under Article I, section 9, clause 3. A law is a bill of attainder if it "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." Nixon v. Adm. of

Gen. Serv., 433 U.S. 425, 468 (1977). The DNA Act applies to those who have already been convicted of a crime and by its terms does not determine guilt or innocence. Further, as set forth above, the DNA Act does not inflict punishment on those who are subject to it, as its purpose is to establish a national database of identifying information and to deter recidivism. The means by which this is accomplished, a blood test, is minimally intrusive and is not punitive. See Jones v. Murray, 962 F.2d 302, 306 (4th Cir. 1992). Therefore, we find that the DNA Act does not constitute a bill of attainder.

In his final constitutional argument, Hook asserts that the DNA Act violates the separation of powers doctrine. The separation of the three branches of government is essential to liberty, however that separation is not complete and entire.Mistretta v. United States, 488 U.S. 361, 372 (1989). While law enforcement is an executive function and a probation officer serves a supervisory function of the judicial branch, a probation officer's collection of DNA does not violate the separation of powers. The probation officer neither analyzes the DNA nor conducts investigations in collecting DNA pursuant to the DNA Act. Moreover, such collection is analogous to a probation officer in his supervisory capacity preventing a supervisee from using drugs by means of drug testing. United States v. Sczubelek, 402 F.3d 175, 188-89 (3d Cir. 2005). Further, as the Third Circuit noted, there is no encroachment on the executive's ability to perform law enforcement functions by virtue of the probation officer's collection of DNA because the probation officer has no role in how the information is used once he submits the sample to the FBI. Id. at 189 (citing Clinton v. Jones, 520 U.S. 681, 701 (1997)). Therefore, we find no violation of the separation of powers doctrine and affirm

the district court's denial of Hook's separation of powers claim.

III.

Because Hook has failed to assert a violation on the part of the government regarding his term of supervised release or a successful constitutional challenge of the DNA Act, we AFFIRM the district court's order denying Hook's request for termination of his term of supervised release and ordering Hook to submit to DNA collection pursuant to the DNA Act.

.A true Copy: Clerk of the United States Court of
Teste: Appeals for the Seventh Circuit

Case 1:04-cr-01045 Document 16 Filed 01/20/2006
1ofl

United States District Court, Northern District of Illinois

Joan H. Lefkow
04 CR 1045

USA vs. George C. Hook

Motion hearing held. Motion [14] of defendant for leave to file reply to Government's response is granted. Enter Memorandum Opinion and Order. For the reasons stated in the Memorandum Opinion and Order, defendant's verified petition [2] is denied. Defendant Hook is ordered to comply with the U.S. Probation's request for a blood sample. The U.S. Probation Office's request to terminate defendant's supervised release is denied. Defendant's motion to quash special report and terminate supervised release [9] is denied.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION
UNITED STATES OF AMERICA

No. 04 CR 1045
v. Judge Joan H. Lefkow

GEORGE HOOK
MEMORANDUM OPINION AND ORDER

Plaintiff George Hook is a supervised releasee who seeks a permanent injunction and a protective order barring the government from taking a sample of his DNA pursuant to the Justice for All Act of 2004 (Public Law 108-405, October 20, 2004) ("2004 DNA Act") and the DNA Analysis Backlog Elimination Act of 2000,42 U.S.C. §§ 14135-14135e(2001 Supp.)("2000 DNA Act"), which require that such samples be collected from felony offenders for inclusion in the Combined DNA Index System ("CODIS"), a national DNA database linking DNA evidence in a nationwide computer network. Presently before the court is Hook's Verified Petition for Declaration of Constitutional Rights, to Enjoin Violations of Terms of Supervised Release by USA, Termination of Supervised Release, Therefor and Protection of Supervised Releasee from the Unconstitutional and Otherwise Unlawful Behavior of the USA ("Verified Petition"). Also before the court are U.S. Probation Officer Tony S. Morion's Request for a Hearing for a Rule to Show Cause Why Supervised Release Should Not Be Revoked and Hook's Objections to

Special Report and Motion to Quash Special Report and Terminate Supervised Release. The court has jurisdiction pursuant to 18 U.S.C, § 3231. See 18 U.S.C. § 3583(e)(3) (court's authority to revoke supervised release under certain circumstances). For the reasons that follow. Hook's verified petition is denied, Morton's request for a hearing is denied, and Hook's motion to quash and terminate supervise release is denied.

BACKGROUND

On May 26, 2004, Hook was sentenced to 84 months of imprisonment on multiple wire fraud and money laundering convictions and 64 months on a theft from an employee benefit plan conviction, all to be served concurrently. Hook was ordered to serve a three-year term of supervised release upon release from imprisonment. Hook's three-year period of supervised release commenced on July 26, 2004.

After serving approximately fifteen months of supervised release, the United States probation office scheduled Hook for a DNA collection on October 27, 2005, pursuant to the 2000 and 2004 DNA Acts. Hook refused to submit to DNA collection pending resolution of his verified petition. Hook maintains that his counsel and Morton and Morton's Supervising U.S. Probation Officer agreed that Hook was not required to appear for DNA testing until Hook's verified petition was resolved by the court. Consequently, Hook contends, he did not appear at the October 27, 2005 appointment. Nevertheless, on November 21, 2005 Morton filed a Request for a Hearing for a Rule to Show Cause Why Supervised Release Should Not Be Revoked based on Hook's alleged non-compliance with the order to submit a blood sample on October 27, 2005. Hook filed in response his Objections to Special Report and Motion to Quash Special Report and Terminate Supervised Release, as well

as a Supplement in Support of his Verified Petition.

The DNA Identification Act of 1994, part of the Violent Crime Control and Law Enforcement Act of 1994, authorized the Federal Bureau of Investigation to create an index of DNA samples from persons convicted of crimes. DNA Identification Act of 1994, § 210304(a), Pub. Law No. 103-332, 108 Stat. 1796. In December 2000 the United States Congress enacted the 2000 DNA Act, which required United States probation offices to collect a DNA sample from each individual being supervised while on probation, parole or supervised release who had been convicted of a qualifying federal offense. DNA Backlog Elimination Act of 2000, § 3, Pub. L. No. 106-546,114 Stat. 2726 (2000) (codified at 42 U.S.C. § 14135a). "Qualifying federal offenses" were limited to violent crimes, including homicides, sex offenses, kidnapping, robbery and conspiracies to commit these offenses. 42 U.S.C. 14135a(d). In October 2004, the United States Congress enacted the 2004 DNA Act, which amended the 2000 DNA Act by expanding the list of qualifying federal offenses for collection of DNA samples to include any felony, any offense under chapter 109A of Title 18, any crime of violence, and any attempt or conspiracy to commit any of those offenses. Justice For All Act of 2004, § 203, Pub. L. No. 108-405,118 Stat. 2260 (codified as 42 U.S.C. 14135a (d).

DISCUSSION

A. Hook's Fourth Amendment Claim

Hook first contends that the 2004 DNA Act violates the Fourth Amendment's prohibition against unreasonable searches and seizures because it compels extraction of blood for a DNA sample in the absence of individualized suspicion or probable cause of any criminal wrongdoing

and "has not been authorized by [a] judicially supervised process." Hook's Verified Petition at 5. Neither party disputes that the statutorily required extraction of blood for DNA collection forces Hook to submit to a "search" without probable cause or reasonable suspicion. See Skinner v. Ry. Labor Executives 'Ass'n, 489 U.S. 602,616-617, 109S.Ct. 1402,1412-1413,103 L.Ed.2d 639 (1989) (blood tests, breathalyser tests, and the taking of urine constitute searches). As a consequence, the only Fourth Amendment issue is whether the DNA collection procedures pursuant to the 2000 DNA Act constitute a reasonable search under the Fourth Amendment.

Courts have utilized two different approaches to address the constitutionality of compelled blood extractions from convicted felons pursuant to the 2000 and 2004 DNA Acts. The first approach employs a reasonableness standard and examines, whether, based upon the totality of the circumstances, the search and seizure are reasonable given the governmental interest involved, the nature of the intrusion, the privacy expectations of the object of the search and, to some extent, the manner in which the search is carried out. United States v. Knights, 534 U.S. 112, 119, 122 S.Ct, 587, 151 L.Ed.2d 497 (2001). The Fourth, Fifth, and Ninth Circuit Courts of Appeals have utilized this reasonableness standard. United States v. Sczubelek, 402 F.3d 175,184 (3rd Cir. 2005).

The Seventh, Second and Tenth Circuits, however, have applied the "special needs" exception to the warrant and probable cause requirements of the Fourth Amendment. See Roe v. Marcotte, 193 F.3d 72 (2d Cir. 1999) (upholding Connecticut DNA statute); Green v. Berge, 354 F.3d 675 (7th Cir. 2004) (upholding Wisconsin DNA statute); United States v. Kimler, 335 F,3d 1132 (10th Cir.

2003). This approach examines whether special needs exist sufficient to justify searches and seizures conducted for important non-law enforcement purposes in situations where complying with the warrant and probable cause requirements would be unfeasible.

Since there is no constitutionally relevant distinction between the Wisconsin statute at issue in Green and the federal statute at issue in this case, it is appropriate to examine the constitutionality of the 2004 DNA Act under the special needs approach.[1]

Whther the special needs exception applies depends upon the purpose of the law in issue. If the primary purpose is ordinary law enforcement, the special needs exception does not apply and the search cannot be upheld under the doctrine. Indianapolis v. Edmond, 531 U.S. 32, 44,48,121 S.Ct. 447,148 L.Ed.2d 333 (2000). Once a non-ordinary law enforcement purpose is identified, however, the court conducts a reasonableness test balancing the individual's

---

[1]Hook attempts to distinguish *Green* by stating that "Unlike all federal statutes heretofore, this Justice for All Act of 2004 purports to apply to persons who have not been convicted and are in no way even suspected of crimes of violence or sex, *i.e.* crimes involving anything that would make DNA relevant." Hook's statement, however, is factually incorrect The Wisconsin statute at issue in *Green,* while originally applicable only to prisoners convicted of certain offenses, was amended in 1999, five years before the decision in *Green,* to require alt persons convicted of felonies in Wisconsin to provide DNA samples. Thus, toe Seventh Circuit's finding that the special needs exception applied to the Wisconsin statute is directly relevant to this case.

privacy interests against the government's special needs. Board of Education of Independent School District No. 92 v. Earls, 536 U.S. 822, 829,122 S.Ct. 2559,153 L.Ed.2d 735 (2002); Ferguson v. City of Charleston, 532 U.S. 67, 81.121 S.Ct. 1281,149 L.Ed.2d 205 (2001)

The Seventh Circuit's decision in Green is again dispositive. In Green, the Seventh Circuit found that the nonconsensual suspicionless search authorized by the Wisconsin DNA collection statute was immunized under the special needs exception because the primary purpose of the statute was not ordinary law enforcement. Green, 354 F.3d at 678. The Wisconsin statute and the 2004 DNA Act were enacted for the same purpose. Both statutes establish a DNA database with the ultimate goal of solving past and future criminal investigations, exonerating the innocent and deterring recidivism. Thus, the purpose of the 2004 DNA Act goes beyond the ordinary law enforcement need. Id; see also Kimler, 335 F.3d at 1146; Sczubelek, 402 F.3d at 175.Having determined that the special needs doctrine applies, Hook's privacy interests must be assessed against the government's special need in order to determine whether the search is reasonable. Persons on conditional release, including parole, probation and supervised release, comprise a separate category of persons for purposes of the Fourth Amendment.[2] See Green, 354 F.3d at 679

---

[2]Hook argues that individuals on supervised release should not be "lumped" together with individuals on parole or probation as a category of persons who have a diminished expectation of privacy. Hook, however, cites no authority for this proposition. Moreover, there is considerable authority, including several Supreme Court cases, supporting Judge Easterbroofc's statement that individuals on supervised release have reduced privacy

(Easterbrook, I, concurring); see also Jones v. Murray, 962 F.2d 302, 307, n. 2 (4th Cir. 1992). Individuals on supervised release enjoy a diminished expectation of privacy.[3]Griffin v. Wisconsin, 483 U.S. at 874 ("To a greater or lesser degree, it is always true of probationers ... that they do not enjoy 'the absolute liberty to which every citizen is entitled, but only... conditional liberty properly dependent on observance of special [probation] restrictions."). In particular, a supervised releasee has no expectation of privacy in proof of his identity. Sczubelek, 402 F.3d at 184 ("Individuals on supervised release cannot reasonably expect to keep information bearing on their physical identity from government records."); Padgett v. Donald, 401 F.3d 1273,1279,1280 (11th Cir. 2005) (finding that prisoners have a reduced expectation of privacy in their identities).

Another factor in the balancing test involves the nature of the search. The intrusion of extracting a blood sample is minimal. Schmerberv. California, 384 U.S. 757, 771, 86 S.Ct, 1826,16 L.Ed.2d 908 (blood tests are "commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.").

---

interests. *See Griffmv. Wisconsin,* 483 U.S. 868, 874, 107 S.Ct 3164, 97 L.Ed.2d 709 (1987); *see alsoNational Treaswy Employees Union v. Yon Raab,* 489 U.S. 656,679.109 S.Ct. 1384,103 L.Ed.2d 685 (1989).

[3]The fact that giving a DNA sample was not originally an express cdnditiofl of Hook's supervised release does oot alter his diminished expectation of privacy as a supervised releasee. *Sczubelek,* 402 F.3d at 185 n. 4.

Thus, balanced against the government interest is a minimal intrusion and a diminished expectation of privacy,

In this case, the government has not identified the interests which are served by the collection of DNA from convicted felons pursuant to the 2004 DNA Act. Nevertheless, the legislative history and cases addressing the constitutionality of the 2000 DNA Act, which the 2004 DNA Act amended to expand the list of qualifying federal offenses, reveal several important government interests served by collection of DNA from convicted felons. First, DNA collection enables state and federal law enforcement to match DNA samples with crime scenes or other evidence in an effort to solve past and future cases.[4] United States v. Reynard, 220 F.Supp.2d 1142,1146 (S.D. Cal. 2002). Second, DNA collection promotes accuracy in the criminal justice system since positive identification would likely exonerate those wrongly accused or convicted of a crime. 2000 WL 1784925 at 5; see Rise v. State of Oregon, 59 F.3d

---

[4]Hook argues that the government has no interest in his DNA because his picture and fingerprints are sufficient to resolve any dispute now or in the future as to his identity. "It is a well recognized aspect of criminal conduct that the perpetrator will take unusual steps to conceal not only his conduct, but also his identity." *Sczubelek*, 402 F.3d at 185. The mere fact that Hook refrained from such conduct in this instance is an insufficient guarantee that he would not attempt to conceal his identity if he engaged in criminal conduct in the future. And while traditional forms of identification may prove sufficient to match suspects with criminal conduct in many cases, it is unquestionable that DNA provides potentially greater precision because it is not susceptible to manipulation. Accordingly, the 2004 DNA Act as applied to Hook continues to serve the government's interests in accuracy in the criminal justice system and deterring recidivists

1556,1561 (noting "overwhelming public interest in prosecuting crimes accurately.") (emphasis omitted). Finally, the DNA Act was enacted to reduce recidivism by incarcerating offenders before they have the opportunity to repeat their crimes in the future.[5] 2000 WL 1784925.

In light of the substantial benefit to society resulting from DNA collection in comparison to the minimal intrusion of blood collection and the diminished privacy interests held by a supervised releasee, the DNA collection authorized by the 2004 DNA-Act is reasonable. See Green, 354 F.3d at 679; see also Sczvbelek, 402 F.3d at 184; United States v. Rodriguez-Benavides, 148 Fed.Appx, 813, 817-818 (11th Cir. 2005) (upholding the 2000 and 2004 DNA Acts against a Fourth Amendment challenge).

B. Hook's Fifth Amendment Claims

Hook next argues that the 2004 DNA Act violates the Fifth Amendment privilege against self-incrimination. But the Supreme Court, in Schmerber v. California, 384 U.S. 757,764-765, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) held that blood test evidence, although potentially incriminating, is neither testimony nor evidence relating to any communicative act. Thus, the Supreme Court held that the involuntary seizure of a blood sample does not implicate the Fifth Amendment privilege. Id; see United Slates v.

---

[5]Hook argues that the government has no interest in his DNA because there is little chance that he would ever engage in criminal conduct in which DNA evidence would be useful. But Hook's argument applies to nearly all individuals subject to the compelled extraction. Indeed, DNA samples "merely offer the potential that some very small percentage may be relevant to solving a crime that in all likelihood has not even been committed at the time of the search." *Nicholas v. Goord*, WL 256774*13 (S.D.N.Y. 2003).

Pipito, 861 F.2d 1006,1009 (7th Cir. 1987) ("[T]he Fifth Amendment privilege against compelled self-incrimination is a testimonial privilege and ... the taking of blood samples or fingerprints is not equivalent to the taking of communicative testimonial evidence."); see also Reynard, 220 F.Supp.2d at 1174 (citing Belgarde v. Montana, 123 F.3d 1210, 1214 (9th Cir. 1997) (blood test results from non-consensual blood test, which ultimately lead to defendant's conviction, are not testimonial or communicative evidence implicating Fifth Amendment concerns).

Hook additionally claims that the 2004 DNA violates his rights under the Due Process Clause of the Fifth Amendment. The Supreme Court, however, has held that the extraction of blood from an individual in a simple, medically acceptable manner, despite an individual's lack of opportunity to object to the procedure, does not offend the ordinary sense of justice provided by the Due Process Clause. See Schmerber, 384 U.S. at 759-760. Accordingly, the extraction of blood for purposes of the 2004 DNA Act, whether voluntary or compelled, does not violate Hook's right to Due Process. See Rise, 59 F.3d 1556; Baling v. Romer, 101 F.3d 1336 (10th Cir. 1996); Groceman v. United States Dep't of Justice, 2002 WL 1398559 (N.D.Tex. 2002).

C. Hook's Eighth Amendment Claim

Hook also argues that the DNA Acts* authorization of compelled blood extractions violates the Eighth Amendment's prohibition against "cruel and unusual punishment." The Eighth Amendment prohibits the "unnecessary and wanton infliction of pain" as well as "barbarous punishments." Rhodes v. Chapman, 452 U.S. 337, 345-346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981)

(internal quotations marks and citations omitted). Application of the Eighth Amendment must be based on "the evolving standards of decency that mark the progress of a maturing society." Id. (citations omitted). The Supreme Court has held that blood tests "would not be considered offensive even by the most delicate." Ytisov v. Martinez, 2000 WL 1593387*5 (S.D.N.Y. 2000) (quoting Bnethaupt v. Abram, 352 U.S. 432,436, 77 S.Ct. 408, 1 L.Ed.2d 448 (1957). Thus, the compelled extraction of a blood sample by the DNA Acts does not violate the Eighth Amendment. See Id. (upholding a New York DNA statute similar to the DNA Acts at issue in this case against an Eighth Amendment challenge); see also Kruger v. Erickson, 875 F.Supp. 583, 588-589 (D.Minn, 1995) (upholding a Minnesota DNA statute similar to the 2000 and 2004 DNA Acts against an Eighth Amendment challenge).

D. Hook's Ninth Amendment Claim

Hook next contends that the Ninth Amendment guarantees a right to his blood. Hook, however, cites no authority for this proposition. The Supreme Court has never held that an individual, much less a supervised reteasee, has ah unconditional right to his blood. Instead, the Supreme Court has repeatedly affirmed the constitutionality of certain blood extractions. See Schmerber, 384 U.S. at 771. Whatever interest Hook has in his blood is diminished by his status as a supervised releasee and is outweighed by the government's interest in accuracy in the criminal justice system, deterring recidivism, and protecting the innocent. Accordingly, the DNA Acts do not violate the Ninth Amendment.

E. Hook's Tenth Amendment Claim

Hook also argues that the 2004 DNA Act violates the Tenth Amendment which provides that "The powers not

delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amend. X. Specifically, Hook maintains that the 2004 DNA Act's expansion of the qualifying federal offenses to include any felony exceeds the power delegated to the federal government under Article I, Section 8. Hook again fails to cite any authority in support of his argument. Nevertheless, the Tenth Amendment does not bar Congress from enacting criminal statutes. United States v. Geiger, 263 F.3d 1034,1041 (7th Cir. 2001). The Supremacy Clause allows Congress to legislate within the confines of its constitutional grant of authority under Article II, Section 9. Id In this case, the 2004 DNA Act was enacted in accordance with the Commerce Clause of the United States Constitution and thus, is not a violation of the Tenth Amendment Reynard, 220 F.Supp.2d at 1173-1174 (upholding the 2000 DNA Act against a Commerce Clause challenge).

F. Hook's Thirteenth Amendment Claim

Hook contends that forced blood extraction by means other than judicial power violates the Thirteenth Amendment's prohibition against slavery. Hook again fails to cite any legal support for his position. Hook's argument is in effect a claim of lack of due process. As discussed in connection with Hook's Fifth Amendment Due Process Clause argument, forced blood extraction does not implicate the Due Process Clause. See Schmerber, 384 U.S. at 759-760. As such, compelled blood extraction does not violate the Thirteenth Amendment.

G. Hook's Fourteenth Amendment Claim

Hook argues that the 2004 DNA Act violates the Fourteenth Amendment because it deprives a supervised

releasee equal protection of the laws. Specifically, Hook contends that individuals on conditional release are treated differently than individuals who have not been convicted of a felony. Convicted felons are not a constitutionally recognized suspect class, Baer v. City of Wauwastosa, 716 F.2d 1125-1126 (7th Cir. 1983). Therefore, only irrational discrimination against them would violate the equal protection clause. Requiring convicted felons to submit a blood sample is rationally related to the government's legitimate interests in improving the accuracy of the criminal justice system and deterring recidivism. Accordingly, the 2004 DNA Act does not violate the Fourteenth Amendment.

H. Hook's Ex Post Facto Clause Claim

Hook next argues that the 2004 DNA Act violates the Ex Post Facto clause because it operates retroactively and increases the punishment for his conviction beyond that available at the time his offenses were committed. The Government responds that the 2004 DNA Act is not an Ex Post Facto violation because collection of a DNA sample is not penal in nature and failure to comply is a misdemeanor under the collection statute and the original terms of supervised release prohibit commission of additional offenses while on supervised release.

To demonstrate an Ex Post Facto violation, a defendant must show "that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and mat it raises the penalty from whatever the law provided when he acted." Johnson v. United States, 529 U.S. 694, 699, 120 S.Ct. 1795, 146 L.Ed.2d 727 (2000). While the Supreme Court has not considered a claim that a DNA collection statute constitutes retroactive punishment forbidden by the Ex Post Facto clause, the

framework for analyzing such a claim is well established. Smith v. Doe, 538 U.S. 84, 92, 123 S.Ct, 1140,155 L.Ed.2d 164. The court must first ascertain whether the legislature meant the statute to establish civil proceedings. Id "If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and nonpunitive," then the court must "examine whether the statutory scheme is 'so punitive either in purpose or effect as to negate [Congress*] intention' to deem it civil." Id. (quoting United States v. Ward, 448 U.S. 242,248-249,100 S.Ct. 2636, 65 L.Ed.2d 742 (1980)).

Thus, the first inquiry is whether the 2000 DNA Act as amended is penal. The Seventh Circuit upheld a similar state statute against an Ex Post Facto clause challenge, holding that DNA collection statutes have a legitimate, non-penal purpose. Gilbert v. Peters, 55 F.3d 237, 238-239 (7th Cir. 1995). Other courts have also upheld similar state statutes against Ex Post Facto challenges. Ewell v. Murray, 11 F.3d 482,486 (4th Cir. 1993); Rise., 59 F.3d at 1559; Shqffer v. Shqffle, 148 F.3d 1180,1181 (10th Cir. 1998). The legislative history reveals that the 2000 and 2004 DNA Acts were not enacted to punish convicted felons, but instead to establish a federal DNA database to assist in the identification, arrest, and prosecution of criminals. See generally Robin Cheryl Miller, Annotation, Validity, Construction, and Operation of State DNA Database Statutes, 76 A.L.R, 5th 239 at § 2 (2000); H.R. Rep. No. 106-900 0), 2000 WL 142016;2000 WL 1420163 at 13-14; 146 Cong. Rec-S11647, 2000 WL 178925. The DNA Acts do not, as Hook argues, increase his punishment for the underlying conviction. While the DNA Acts provide for sanctions for non-compliance, those sanctions relate to the

defendant's present conduct and not for his past conduct. As such, the 2004 DNA Act does not violate the Ex Post Facto clause.

I. Hook's Bill of Attainder Claim

Hook argues that the 2004 DNA Act constitutes an impermissible Bill of Attainder. Article I, § 9, cl. 3, of the United States Constitution provides that "[n]o Bill of Attainder...shall be passed" by Congress. A statute constitutes a bill of attainder if it (1) "single(s) out an identifiable group"; (2) "inflict(s) punishment;" and (3) "dispense(s) with a judicial trial." Nixon v. Administrator of General Services, 433 U.S. 425,468, 97 S.Ct. 2777, 53 L.Ed.2d 867 (1977); Selective Service System v. Minnesota Public Interest Research Group, 468 U.S. 841, 846-7,104 S.Ct. 3348, 82 L.Ed.2d 632 (1984).

To determine whether a challenged act "inflict(s) punishment" for bill of attainder purposes, courts are instructed to assess whether (1) the act "falls within the historical meaning of legislative punishment," (2) the act "reasonably can be said to further non-punitive purposes," and (3) the legislative intent reveals a "Congressional intent to punish." Nixon, 433 U.S. at 475-478.

As discussed in connection with Hook's ex post facto argument, the 2000 and 2004 DNA Acts are non-penal. The DNA Acts promote the non-punitive goals of establishing a federal DNA database, improving the accuracy of the criminal justice system, and deterring recidivism. See generally Robin Cheryl Miller, Annotation, Validity, Construction, and Operation of State DNA Database Statutes, 76 A.L.R. 5th 239 at § 2 (2000); H.R. Rep. No. 106-900 (I), 2000 WL 142016; 2000 WL 1420163 at 13-14; 146 Cong. Rec. SI 1647, 2000 WL 178925. While forced blood extraction imposes an obligation on Hook, it

is a minimal intrusion that is "closely analogous to the administrative taking of an offender's standard fingerprint or the recordation of an offender's physical characteristics," Reynard, 220 F.Supp.2d at 1164. Since the DNA Acts do not inflict punishment, the DNA Acts do not constitute an unconstitutional bill of attainder as applied to Hook.

J. Hook's Separation of Powers Claim

Hook also argues that the DNA Acts violate the Separation of Powers doctrine by requiring the U.S. Probation Office to perform law enforcement duties. Specifically, Hook contends that since the DNA Acts require probation officers to collect DNA samples and submit the samples they obtain to the Federal Bureau of Investigation, the probation officers are improperly performing executive branch functions.

"Within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty." Mistretta v. United States, 488 U.S. 361, 372,109 S.Ct. 647,102 L.Ed,2d 714 (1989). Nonetheless, the three branches of government are not required to be "entirely separate and distinct." Id Thus, the court has upheld "statutory provisions that to some degree commingle the functions fo the Branches, but that pose no danger of either aggrandizement or encroachment." Id at 382. For instance, in Mistretta, the Supreme Court held that the Federal Sentencing Guidelines do not violate the Separation of Powers doctrine. Id. at 372.

The duties delegated to probation officers under the DMA Acts do not appear to pose a danger of encroachment on the executive branch by judicial officers. The duty to collect blood samples from felons on conditional release is consistent with the monitoring, supervision, and reporting duties already assigned to probation officers and approved

in Mistretta. Reynard, 220 F.Supp.2d at 1171 (upholding the 2000 DNA Act against a Separation of Powers). Similarly, the "detain" and "restrain" powers accorded probation officers by the DNA Acts is not appreciably broader than the arrest powers Congress has delegated to probation officers under 18 U.S.C. § 3606. Id. While these duties do possess a law enforcement aspect, they nevertheless "reflect the practical necessity of a limited degree of commingling and interdependence among the branches," United States v. Stegman, 295 F. Supp.2d 542, 551 (D-Md. 2003). As such, the duties delegated to probation officers under the DNA Acts is not a violation of the Separation of Powers doctrine.

CONCLUSION

For the reasons discussed above, Hook's verified petition [#2] is denied. Hook is ordered to comply with the U.S. Probation Office's request for a blood sample. Hook has stated that if the court determined that he was subject to DNA testing, he would voluntarily submit a blood sample. In light of this representation, the court denies without prejudice the U.S. Probation Office's request to terminate Hook's supervised release. Hook's motion to quash special report and terminate supervised release [#9] is denied.

Dated: January 20, 2006

Enter: /s/Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States District Judge

The following **Constitutional** provisions are involved in this Petition for Writ of Certiorari:

Article I, §9:
No bill of attainder or *ex post facto* law shall be passed.

Article IV, § 2:
The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

4th Amendment:
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5th Amendment:
...nor shall [any person] be compelled in any criminal case to be a witness, against himself, nor be deprived of life, liberty, or property, without due process of law...
...nor shall private property be taken for public use without just compensation.

6th Amendment:
In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him...

8th Amendment:
...nor cruel and unusual punishments inflicted.

9th Amendment:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

10th Amendment:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

13th Amendment:
Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

***

The following **Statutory** provisions as in effect at the relevant time are involved in this Petition for Writ of Certiorari:

18 USC 664. Theft or embezzlement from employee benefit plan. Any person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use or to the use of another, any of the moneys, funds, securities, premiums, credits, property, or other assets of any employee welfare benefit plan or employee pension benefit plan, or of any fund connected therewith, shall be fined under this title, or imprisoned not more than five years, or both.
As used in this section, the term "any employee welfare benefit plan or employee pension benefit plan" means any employee benefit plan subject to any provision of title I of the Employee Retirement Income Security Act of 1974.

18 USC 1343. Fraud by wire, radio, or television. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

18 USC 1956. Laundering of monetary instruments.

(a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity—

***

(B) knowing tht the transaction is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity;

***

(c) As used in this section—

(1) the term "knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity" means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felon under State, Federal, or foreign law,

regardless of whether or not such activity is specified in paragraph (7);

(2) the term "conducts" includes initiating, concluding, or participating in initiating, or concluding a transaction;

(3) the term "transaction" includes a purchase, sale, loan, pledge, gift, transfer, delivery, or other disposition, and with respect to a financial institution includes a deposit, withdrawal, transfer between accounts, exchange of currency, loan, extension of credit, purchase or sale of any stock, bond, certificate of deposit, or other monetary instrument, use of a safe deposit box, or any other payment, transfer, or delivery by, through, or to a financial institution, by whatever means effected;

(4) the term "financial transaction" means (a) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (b) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree;

(5) the term "monetary instruments" means (i) coin or currency of the United States or of any other country, travelers' checks, personal checks, bank checks, and money orders, or (ii) investment securities or negotiable instruments, in bearer form or otherwise in such form that title thereto passes upon delivery;

(6) the term "financial institution" has the definition given that term in section 5312(a)(2) of title 31, United States Code, or the regulations promulgated thereunder;

(7) the term "specified unlawful activity" means—

(A) any act or activity constituting an offense listed in section 1961(1) of this title except an act which is indictable under subchapter 11 of chapter 53 of title 31;...

***

18 USC 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means...(B) any act which is indictable under any of the following provisions of title 18, United States Code:...section 664 (relating to embezzlement from pension and welfare funds),...section 1343 (relating to wire fraud),...section 1956 (relating to the laundering of monetary instruments),...

18 USC 3583(a). Inclusion of a term of supervised release after imprisonment.

(a) In general. The court...may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute...

***

(c) Factors to be considered in including a term of supervised release. The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

(d) Conditions of supervised release. The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime

during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561 (b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563 (a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test confirmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in

accordance with United States Sentencing Commission guidelines from the rule of section 3583 (g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553 (a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994 (a);

any condition set forth as a discretionary condition of probation in section 3563(b)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation.

(e) Modification of Conditions or Revocation. The court may, after considering the factors set forth in section 3553 (a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5),and (a)(6), —

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written Statement of Conditions. The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which

the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

***

18 USC 3601 provides as pertinent to the Petition:
[a] person who has been...placed on supervised release pursuant to the provisions of § 3583, shall, during the term imposed be supervised by a probation officer to the degree warranted by the conditions specified by the sentencing court.

18 USC 3603 provides as pertinent to the Petition:
A probation officer shall-

(1) instruct a...person on supervised release, who is under his supervision, as to the conditions specified by the sentencing court, and provide him with a written statement clearly setting forth all such conditions;

***

(3) use all suitable methods, not inconsistent with the conditions specified by the court, to aid a...person on supervised release who is under his supervision, and to bring about improvements in his conduct and condition.

***

DNA Analysis Backlog Identification Act of 2000 (did not come into effect until eight years after Hook's alleged offenses and two years after his sentencing):
§7(b) Conditions of Supervised Release. §3583(d)of title 18 USC is amended by inserting before the court shall also order the following: The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant,

if the collection of such sample is authorized per §3["sex and violent offenders" only until 10/30/04 (12 years after Hook's alleged offenses, six years after his sentencing and also after the commencement of his supervised release and the reading of the conditions thereof to him and his submission to three body fluid extractions) when "any felon" was substituted by the Justice for All Act of 2004]of the DNA Analysis Backlog Elimination Act of 2000.

18 USC 3663. Order of Restitution.
(a) (1) The court, when sentencing a defendant convicted of an offense under this title or section 46312, 46502, or 46504 of title 49, may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense.

(2) For the purposes of restitution, a victim of an offense that involves as an element a scheme, a conspiracy, or a pattern of criminal activity means any erson directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern.

(3) The court may also order restitution in any criminal case to the extent agreed by the parties in a plea agreement.
(b) The order may require that such defendant--

(1) in the case of an offense resulting in damage to or los or destruction of property of a victim of the offense—

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of—

(i) the value of the property on the date of the damage, loss or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim...

(3) in the case of an offense resulting in bodily injury...

(4) in any case, reimburse the victim for lost income and necessary ...expenses related to participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense; and

(5) in the case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(e) (1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in—

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than—

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General or the person designated under section 604(a)(18) of title 28 for transfer to such victim or person.

(g) If such defendant is placed on probation or sentenced to a term of supervised release under this title, any restitution ordered under this section shall be a condition of such probation or supervised release. The court may revoke probation or a term of supervised release, or modify the term or conditions of probation or a term of supervised release, or hold a defendant in contempt pursuant to section 3583(e) if the defendant fails to comply with such order. In determining whether to revoke probation or a term of supervised release, modify the term or conditions of proba-

tion or supervised release, or hold a defendant serving a term of supervised release in contempt, the court shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) Any order of restitution may be enforced—

(1) by the United States—

(A) in the manner provided for the collection and payment of fines in subchapter B of chapter 229 of this title; or

(B) in the same manner as a judgment in a civil action; and

(2) by a victim named in the order to receive the restitution, in the same manner as a judgment in a civil action.

***

18 USC 3664. Procedure for issuance and enforcement of order of restitution.

(a) The court, in determining whether to order restitution under section 3663 of this title and the amount of such restitution, all consider the amount of the loss sustained by any victim as a result of the offense, the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(b) The court may order the probation service of the court to obtain information pertaining to the factors set forth in subsection (a) of this section. The probation service of the court shall include the information collected in the report of presentence investigation or in a separate report, as the court directs.

(c) The court shall disclose to both the defendant and the attorney for the Government all portions of the presentence

or other report pertaining to the matters described in subsection (a) of this section.

(e) Any dispute as to the proper amount or type of restitution shall be resolved by the court by the preponderance of the evidence. The burden of demonstrating the amount of the loss sustained by a victim as a result of the offense shall be on the attorney for the Government. The burden of demonstrating the financial resources of the defendant and the financial needs of the defendant's dependents, shall be on the defendant. The burden of demonstrating such other matters as the court deems appropriate shall be upon the party designated by the court as justice requires.

(e) A conviction of a defendant for an offense involving the act giving rise to an order of restitution shall estop the defendant from denying the essential allegations of that offense in any subsequent Federal civil proceeding or State civil proceeding, to the extent consistent with State law, brought by the victim.

28 USC 1361. Action to compel an officer of the United States to perform his duty.

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

28 USC1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

28 USC 2201. Creation of remedy.
(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.
(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act.

28 USC 2202. Further relief.
Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

28 USC 2241. Power to grant writ.
(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be ~~entered~~ in the records of the district

court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

(d) Where an application for a writ of habeas corpus is made by a person in custody under the judgment and sentence of a State court of a State which contains two or more Federal judicial districts, the application may be filed in the district court for the district wherein such person is in custody or in the district court for the district within which the State court was held which convicted and sentenced him and each of such district courts shall have concurrent juris-

diction to entertain the application. The district court for the district wherein such an application is filed in the exercise of its discretion and in furtherance of justice may transfer the application to the other district court for hearing and determination.

28 USC 2255. Federal custody; remedies on motion attacking sentence.

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Ap-

pointment of counsel under this section shall be governed by section 3006A of title 18.

A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain—

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

42 USC 14135a. Collection and use of DNA identification information from certain Federal offenders.

(a) Collection of DNA samples

(1) From individuals in custody

The Director of the Bureau of Prisons shall collect a DNA sample from each individual in the custody of the Bureau of Prisons who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d) of this section)or a qualifying military offense, as determined under section 1565 of title 10.

(2) From individuals on release, parole, or probation

The probation office responsible for the supervision under Federal law of an individual on probation, parole, or supervised release shall collect a DNA sample from each such individual who is, or has been, convicted of a qualifying Federal offense (as determined under subsection (d) of this section) or a qualifying military offense, as determined under section 1565 of title 10.

(3) Individuals already in CODIS

For each individual described in paragraph (1) or (2), if the Combined DNA Index System (in this section referred to as "CODIS") of the Federal Bureau of Investigation contains a DNA analysis with respect to that individual, or if a DNA sample has been collected from that individual under section 1565 of title 10, the Director of the Bureau of Prisons or the probation office responsible (as applicable) may (but need not) collect a **DNA** sample from that individual.

(4) Collection procedures

(A) The Director of the Bureau of Prisons or the probation office responsible (as applicable) may use or authorize the use of such means as are reasonably necessary to detain, restrain, and collect a DNA sample from an individual who refuses to cooperate in the collection of the sample.

(B) The Director of the Bureau of Prisons or the probation office, as appropriate, may enter into agreements with units of State or local government or with private entities to provide for the collection of the samples described in paragraph (1) or (2).

(5) Criminal penalty

An individual from whom the collection of a DNA sample is authorized under this subsection who fails to cooperate in the of that sample shall be--

(A) guilty of a class A misdemeanor; and

(B) punished in accordance with title 18.

(b) Analysis and use of samples

The Director of the Bureau of Prisons or the probation office responsible (as applicable) shall furnish each DNA sample collected under subsection (a) of this section to the Director of the Federal Bureau of Investigation, who shall carry out a DNA analysis on each such
DNA sample and include the results in CODIS.

(c) Definitions

In this section:

(1) The term "DNA sample" means a tissue, fluid, or other bodily sample of an individual on which a DNA analysis can be carried out.

(2) The term "DNA analysis" means analysis of the deoxyribonucleic acid (DNA) identification information in a bodily sample.

(d) Qualifying Federal offenses

(1) The offenses that shall be treated for purposes of this section as qualifying Federal offenses are the following offenses under title 18, as determined by the Attorney General:

(A) Murder (as described in section 1111 of such title), voluntary manslaughter (as described in section 1112 of such title), or other offense relating to homicide (as described in chapter 51 of such title, sections 1113, 1114, 1116, 1118, 1119, 1120, and 1121).

(B) An offense relating to sexual abuse (as described in chapter 109A of such title, sections 2241 through 2245), to sexual exploitation or other abuse of children (as described in chapter 110 of such title, sections 2251 through 2252), or to transportation for illegal sexual activity (as described in chapter 117 of such title, sections 2421, 2422, 2423, and 2425).

(C) An offense relating to peonage and slavery (as described in chapter 77 of such title).

(D) Kidnapping (as defined in section 3559(c)(2)(E) of such title).

(E) An offense involving robbery or burglary (as described in chapter 103 of such title, sections 2111 through 2114, 2116, and 2118 through 2119).

(F) Any violation of section 1153 involving murder, manslaughter, kidnapping, maiming, a felony offense relat-

ing to sexual abuse (as described in chapter 109A), incest, arson, burglary, or robbery.

(G) Any attempt or conspiracy to commit any of the above offenses.

(2) In addition to the offenses described in paragraph (1), the following offenses shall be treated for purposes of this section as qualifying Federal offenses, as determined by the Attorney General:

(A) Any offense listed in section 2332b(g)(5)(B) of title 18.

(B) Any crime of violence (as defined in section 16 of title 18).

(C) Any attempt or conspiracy to commit any of the above offenses.

(e) Regulations

(1) In general

Except as provided in paragraph (2), this section shall be carried out under regulations prescribed by the Attorney General.

(2) Probation officers

The Director of the Administrative Office of the United States Courts shall make available model procedures for the activities of probation officers in carrying out this section.

(f) Commencement of collection

Collection of DNA samples under subsection (a) of this section shall, subject to the availability of appropriations, commence not later than the date that is 180 days after December 19, 2000.

(Pub. L. 106-546, Sec. 3, Dec. 19, 2000, 114 Stat. 2728; Pub. L. 107-56,

title V, Sec. 503, Oct. 26, 2001, 115 Stat. 364.)

USSG 5D1.3. Conditions of Supervised Release. (a) If a term of supervised release is imposed, thecourt shall impose a condtion tht the defendant not commit another federal, state , or local crime. 18 USC 3583(d). The court shall also impose a condition that the defendant not possess illegal controlled substances. 18 USC 3563(a)(3).
(b) The court may impose other conditions of supervised release, to the extent that such conditions are reasonablyh related to (1) the nature and circumstances of the offense and the history and characteristics of the defendant, and (2) the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes of the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. 18 USC §§ 3553(a)(2) and 3583(d).
(c) Recommended conditions of supervised release are set forth in USSG 5B1.4.[1]

The following **Rules** as in effect at the relevant times are involved in this Petition for Writ of Certiorari:

This version of the Federal Rule of Criminal Procedure relating to modification was in effect at the time Hook was sentenced:

Fed. R. Crim. P. 32.1 (b) Modification of Probabtion or Supervised Release. A hearing and assistance of counsel are required before the terms or conditions of probation [or supervised release] can be modified, unless the relief to be

---

[1]These were the standard conditions imposed on Hook and did not include a DNA collection condition.

granted to the person on probation [or supervised release] upon the person's request or the court's own motion if favorable to the person, and the attorney for the government, after having been given notice of the proposed relief and a reasonable opportunity to object has not objected. An extension of the term of probation [or supervised release] is not favorable to the person for the purposes of this rule.
[The provision was adopted in 1979; "or supervised release" was added in 1989.]

This version of Federal Rule of Criminal Procedure relating to modification to which Judge Manion makes reference in his opinion came into effect Dec. 1, 2002 and. Dec. 1, 2005:

Fed. R. Crim. P. 32.1(c) Modification. (1) In General. Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel. (2) Exceptions. A hearing is not required if: (A) the person waives the hearing; or (B) the relief sought is favorable to the person and does not extend the term of probation or of supervised release; and (C) an attorney for the government has received notice of the relief sought, has had a reasonable opportunity to object, and has not done so.
(d) Disposition of the Case. The court's disposition of the case is governed by 18 U.S.C. § 3563 and § 3565 (probation) and § 3583 (supervised release).

[NOTES OF ADVISORY COMMITTEE ON RULES - 1979
Note to Subdivision (b). Subdivision (b) concerns proceedings on modification of probation (as provided for in 18

U.S.C. § 3651). The probationer should have the right to apply to the sentencing court for a clarification or change of conditions. American Bar Association, Standards Relating to Probation Sec. 3.1(c) (Approved Draft, 1970). This avenue is important for two reasons: (1) the probationer should be able to obtain resolution of a dispute over an ambiguous term or the meaning of a condition without first having to violate it; and (2) in cases of neglect, overwork, or simply unreasonableness on the part of the probation officer, the probationer should have recourse to the sentencing court when a condition needs clarification or modification. Probation conditions should be subject to modification, for the sentencing court must be able to respond to changes in the probationer's circumstances as well as new ideas and methods of rehabilitation. See generally ABA Standards, supra, Sec. 3.3. The Sentencing court is given the authority to shorten the term or end probation early upon its own motion without a hearing. And while the modification of probation is a part of the sentencing procedure, so that the probationer is ordinarily entitled to a hearing and presence of counsel, a modification favorable to the probationer may be accomplished without a hearing in the presence of defendant and counsel. United States v. Bailey, 343 F.Supp. 76 (W.D.Mo. 1971).

NOTES OF ADVISORY COMMITTEE ON RULES - 2002 AMENDMENT

Rule 32.1 has been completely revised and expanded. The Committee believed that it was important to spell out more completely in this rule the various procedural steps that must be met when dealing with a revocation or modification of probation or supervised release.]

The following **Regulations** as in effect at the relevant times are involved in this Petition for Writ of Certiorari:

Department of Labor Regulation
§2510.3-101 Definition of "plan assets"—plan investments—(a) In general. (1 This section describes what constitutes assets of a plan with respect to a plan's investment in another entity for purposes of Subtitle A, and Parts 1 and 4 of Subtitle B, of Title I of the Act and section 4975 of the Internal Revenue Code. Paragraph (a)(2) of this section contains a general rule relating to plan investments. Paragraphs (b) through (f) of this section define certain terms that are used in the application of the general rule. Paragraph (g) of this section describes how the rules in this section are to be applied when a plan owns property jointly with others or where it acquires an equity interest whose value relates solely to identified assets of an issuer. Paragraph (h) of this section contains special rules relating to particular kinds of plan investments...Paragraph (j) of this section contains examples illustrating the operation of this section.

(2) Generally, when a plan invests in another entity, the plan's assets include its investment, but do not, solely by reason of such investment, include any of the underlying assets of the entity. However, in the case of a plan's investment in an equity interest of an entity that is neither a publicly-offered security nor a security issued by an investment company registered under the Investment Company Act of 1940, its assets include both the equity interest and an undivided interest in each of the underlying assets of the entity, unless it is established that—

(i) The entity is an operating company, or

(ii) Equity participation in the entity by benefit plan investors is not significant.

Therefore, any person who exercises authority or control respecting the management or disposition of such underlying assets, and any person who provides investment advice with respect to such assets for a fee(direct or indirect), is a fiduciary of the investing plan.

(b) [irrelevant provisions relating to publicly offered securities]

***

(c) "Operating company". (1) An "operating company" is an entity that is primarily engaged, directly or through a majority owned subsidiary or subsidiaries, in the production or sale of a product or service other than the investment of capital. The term "operating company" includes an entity which is not described in the preceding sentence, but which is a "venture capital operating company" described in paragraph (d) or a "real estate operating company" described in paragraph (e).

***

(d)(5) For purposes of this paragraph (d) and paragraph (e)—

(i) An "initial valuation date" is the later of—

***

(B) The first date on which an entity makes an investment that is not a short-term investment of funds pending long-term commitment.

(ii) An "annual valuation period" is a preestablished annual period, not exceeding 90 days in duration, which begins no later than the anniversary date of an entity's initial valuation date. An annual valuation period, once established, may not be changed except for good

cause unrelated to a determination under this paragraph (d) or (e).

(e) "Real estate operating company". An entity is a "real estate operating company" for the period beginning on an initial valuation date described in paragraph (d)(5)(i) and ending on the last day of the first "annual valuation period" described in paragraph (d)(5)(ii)(in the case of an entity that is not a real estate operating company immediately before the determination or for the 12-month period following the expiration of an annual valuation period described in paragraph (d)(5)(ii)(in the case of an entity that is a real estate operating company immediately before the determination if:

(1) On such initial valuation date, or on any date within such annual valuation period, at least 50 percent of its assets, valued at cost (other than short-term investments pending long-term commitment or distribution to investors), are invested in real estate which is managed or developed and with respect to which such entity has the right to substantially participate directly in the management or development activities; and

(2) During such 12-month period (or during the period beginning on the initial valuation date and ending on the last day of the first annual valuation period) such entity in the ordinary course of its business is engaged directly in real estate management or development activities.

(f) Participation by benefit plan investors. (1) Equity participation in an entity by benefit plan investors is "significant" on any date if, immediately after the most recent acquisition of any equity interest in the entity, 25 percent or more of the value of any class of equity interests in the entity is held by benefit plan investors (as defined in paragraph (f)(2)). For purposes of determinations pursuant

to this paragraph (f), the value of any equity interests held by a person (other than a benefit plan investor) who has discretionary authority or control with respect to the assets of the entity or any person who provides investment advice for a fee (direct or indirect) with respect to such assets, or any affiliate of such a person, shall be disregarded.

(2) A "benefit plan investor" is any of the following—

(i) Any employee benefit plan (as defined in section 3(3) of the Act[2]) whether or not it is subject to the provisions of Title I of the Act,

(ii) Any plan described in section 4975(e)(1) of the Internal Revenue Code,

(iii) Any entity whose underlying assets include plan assets by reason of a plan's investment in the entity.

(3) An "affiliate" of a person includes any person, directly or indirectly, through one or more intermediaries, controlling, controlled by, or under common control with

---

[2]Section 3(3) of ERISA [§ 1002(3)] states: "The term 'employee benefit plan' or 'plan' means an employee welfare benefit plan or an employee pension benefit plan or a plan which is both an employee welfare benefit plan and an employee pension benefit plan." Section 3(1) of ERISA [§ 1002(1)] states in relevant part: "The terms 'employee welfare benefit plan' and 'welfare plan' mean any plan,...for the purpose...(other than pensions on retirement or death, and insurance to provide such pensions)... Section 3(2) of ERISA [§ 1002(2)] states in relevant part: "...the terms 'employee pension benefit plan' and 'pension plan' mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer...to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—(i) provides retirement income to employees...

the person. For purposes of this paragraph (f)(3), "control", with respect to a person other than an individual, means the power to exercise a controlling influence over the management or policies of such person.

(g) Joint ownership. For purposes of this section, where a plan jointly owns property with others, or where the value of a plan's equity interest in any entity relates solely to identified property of the entity, such property shall be treated as the sole property of a separate entity.

(h) Specific rules relating to plan investments. Notwithstanding any other provision of this section—

(1) Except where the entity is an investment company registered under the Investment Company Act of 1940, when a plan acquires or holds an interest in any of the following entities its assets include its investment and an undivided interest in each of the underlying assets of the entity:

(i) A group trust which is exempt from taxation under section 501(a) of the Internal Revenue Code pursuant to the principles of Rev. Rul. 81-11, 1981 C.B. 326,

(ii) A common or collective trust fund of a bank,

(iii) A separate account of an insurance company, other than a separate account that is maintained solely in connection with fixed contractual obligations of the insurance company under which the amounts payable, or credited, to the plan and to any participant or beneficiary of the plan (including an annuitant) are not affected in any manner by the investment performance of the separate account.

(2) When a plan acquires or holds an interest in any entity (other than an insurance company licensed to do business in a State) which is established or maintained for

the purpose of offering or providing any benefit described in section 3(1) or section 3(2) of the Act to participants or beneficiaries of the investing plan, its assets will include its investment and an undivided interest in the underlying assets of that entity.

(3) When a plan or a related group of plans owns all of the outstanding equity interests (other than director's qualifying shares) in an entity, its assets include those equity interests and all of the underlying assets of the entity. This paragraph (h)(3) does not apply, however, where all of the outstanding equity interests in any entity are qualifying employer securities described in section 407(d)(5) of the Act, owned by one or more eligible individual account plan(s) (as defined in section 407(d)(3) of the Act) maintained by the same employer, provided that substantially all of the participants in the plan(s) are, or have been, employed by the issuer of such securities or by members of a group of affiliated corporations (as determined under section 407(d)(7) of the Act) of which the issuer is a member.

***

(j) Examples. The principles of this section are illustrated by the following examples:

***

(7) A plan, P, invests (pursuant to a private offering) in a limited partnership, W, that is engaged primarily in investing and reinvesting assets in equity positions in real property. The properties acquired by W are subject to long-term leases under which substantially all management and maintenance activities with respect to the property are the responsibility of the lessee. W is not engaged in the management or development of real estate merely because it assumes the risks of ownership of income-producing real property, and W is not a real estate operating company. If

there is significant equity participation in W by benefit plan investors, P will be considered to have acquired an undivided interest in each of the underlying assets of W.

(8) Assume the same facts as in paragraph (j)(7) except that W owns several shopping centers in which individual stores are leased for relatively short periods to various merchants (rather than owning properties subject to long-term leases under which substantially all management and maintenance activities are the responsibility of the lessee). W retains independent contractors to manage the shopping center properties. These independent contractors negotiate individual leases, maintain the common areas and conduct maintenance activities with respect to the properties. W has responsibility to supervise and the authority to terminate the independent contractors. During its most recent valuation period more than 50 percent of W's assets, valued at cost, are invested in such properties. W is a real estate operating company. The fact that W does not have its own employees who engage in day-to-day management and development activities is only one factor in determining whether it is actively managing or developing real estate. Thus, P's assets include its interest in W, but do not include any of the underlying assets of W.

***